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**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington D.C. 20554**

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|---|---|---|
| In the Matter of | ) | |
| | ) | |
| Availability of INTELSAT | ) | IB Docket No. 00-91 |
| Space Segment Capacity to | ) | |
| Users and Service Providers | ) | |
| Seeking to Access | ) | |
| INTELSAT Directly | ) | |
| | ) | |

To: The Commission

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# EXECUTIVE SUMMARY

In a *Notice of Proposed Rulemaking* (*NPRM*) instituted pursuant to the ORBIT Act, the FCC has asked for comment on:

- whether U.S. carriers and users have a "sufficient opportunity" to obtain direct access to the INTELSAT satellite system; and, if not
- what, if any, government action would be "necessary" and "appropriate" to correct any such direct access problem.

As set forth below, the evidence demonstrates conclusively that there is no direct access "problem" which would foreclose users from gaining "sufficient opportunity" to use the INTELSAT system. Moreover, ORBIT imposes very specific limitations on the kinds of regulatory solutions that would be warranted should any such problems arise.

## U.S. Users Have "Sufficient Opportunity" To Obtain Level 3 Direct Access To INTELSAT Space Segment Capacity.

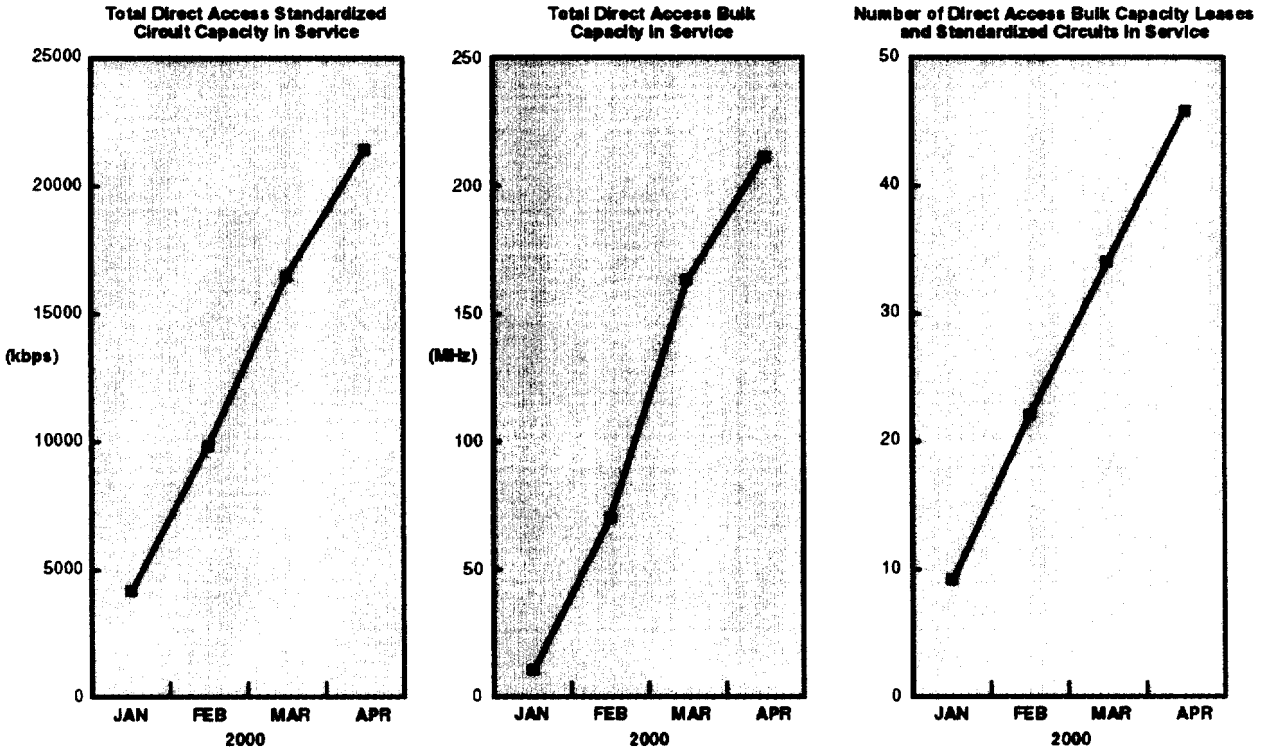
Under the ORBIT Act, the FCC must "determine if users or providers of telecommunications services have sufficient opportunity to access INTELSAT space segment capacity directly from INTELSAT to meet their service or capacity requirements." 47 U.S.C. § 641(b). Clearly, they do. Since direct access was implemented in December 1999, many U.S. users have been able to take advantage of these opportunities.

***Many U.S. Carriers and Users Already Have Obtained Space Segment Capacity Directly from INTELSAT.*** Although "direct access" in the U.S. is only six months old, at least eleven U.S. companies have already become direct access customers. Through April 2000 (the last month for which complete data is available), at least 49 different service orders have been

accommodated, including 23 orders for Bulk Capacity and 26 for Standardized Circuits. In addition, almost 10,000 minutes of occasional-use video transmissions were supplied by INTELSAT to U.S. direct access customers. In all, the total INTELSAT tariff value of U.S. direct access usage has grown by at least 60% each month. Figure 1 illustrates the month-by-month increase in direct access to INTELSAT since January, 2000.

## Figure 1

## U.S. Direct Access Is Increasing Steadily



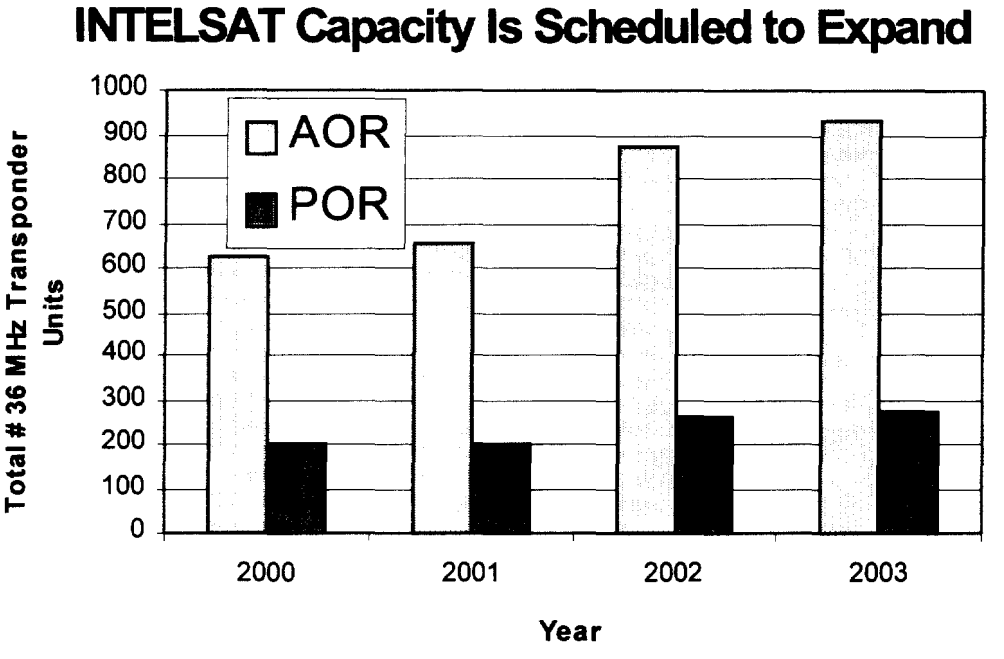

***INTELSAT Currently Has Only a Small Amount of Unused Space Segment Capacity.***

The steady increase in the amount of direct access demonstrates that there have been many opportunities for carriers and users to obtain space segment capacity directly from INTELSAT. At present, however, the level of direct access (as well as access by Signatories such as

COMSAT) is constrained by the shortage of available INTELSAT capacity. As a result of the explosive world-wide growth in popularity of the Internet, the demand for international satellite and fiber-optic cable capacity has temporarily outstripped supply. Over 80% of INTELSAT's existing capacity is currently in use, and some of the system's most desirable connectivities are all but sold out. For this reason – and this reason alone – INTELSAT has not been able to fulfill every U.S. service order it has received, either from COMSAT or from other direct access customers.

***Direct Access Opportunities Will Increase as INTELSAT Deploys New Capacity and Commitments on Existing Capacity Expire.*** The availability of sufficient opportunities for direct access, however, is not a static process. In the near term, such opportunities will increase as current INTELSAT customers' lease commitments expire and existing capacity comes back on the market. At that point, the competition between COMSAT and INTELSAT envisioned by the *Direct Access Order* and ORBIT will ensure that users benefit. In the longer term, INTELSAT intends to launch by year-end 2003 seven new, higher-capacity satellites that will serve the overburdened Atlantic Ocean Region ("AOR"). At the same time, it will also increase Pacific Ocean Region ("POR") capacity by redeploying more advanced satellites to existing POR orbital locations. As illustrated in Figure 2, these new deployments will cure the current system capacity limitation and enhance considerably the opportunities for U.S. entities to obtain INTELSAT space segment directly.

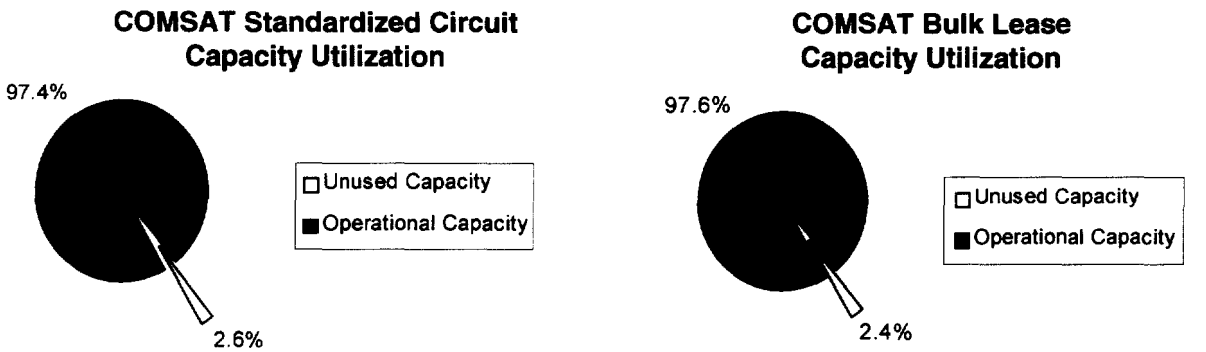
## Figure 2




***COMSAT Does Not "Warehouse" Capacity That It Cannot Or Does Not Use.*** The *NPRM* seeks to determine whether COMSAT is "warehousing" capacity for which it has no near-term use. The evidence proves that COMSAT has not engaged in any such practices. In fact, as shown in Figure 3, more than 97% of COMSAT's INTELSAT capacity is currently being used by COMSAT's customers to provide service.

# Figure 3

## COMSAT Has Not Warehoused Capacity




Since the implementation of direct access on December 6, 1999, COMSAT has placed precisely 32 "guaranteed reservations" (*i.e.*, commitments to take or pay for certain specified INTELSAT capacity beginning on a date certain). A firm customer order lies behind *every one* of those 32 reservations. Moreover, during that same time, COMSAT did not place *even one* "first right of refusal" (FRR) reservation (*i.e.*, purchase option).

The absence of any "warehousing" problem can be further illustrated by taking a closer look at the two main ways in which INTELSAT capacity is packaged and marketed—*i.e.*, as "Standardized Circuits" or as "Bulk Capacity."

Standardized Circuits: Under INTELSAT's rules, COMSAT must pay for Standardized Circuits leased under long-term contracts, regardless of whether those Circuits are actually in service. COMSAT cannot afford to pay for "vaporware," and therefore must insist on retaining enough actual, in-service circuits to cover its commitments. For this reason, the company cannot relinquish individual Circuits for which it has already committed to pay.

In addition, under INTELSAT's ordering procedures, Standardized Circuits (which constitute roughly 30% of INTELSAT's U.S. capacity) *cannot* be reserved in advance.

Accordingly, the *NPRM* fundamentally errs in its statement that "[t]he INTELSAT arrangements for capacity distribution to Signatories and direct access users provide a process through which INTELSAT capacity can be tied up well into the future, even before satellites are constructed and launched." *Id.* ¶ 15.

Bulk Capacity: Unlike Standardized Circuits, INTELSAT space segment capacity furnished to U.S. carriers and users as "Bulk Capacity" *can* be reserved in advance. Moreover, expiring Bulk Capacity leases may be renewed. However, COMSAT has never used INTELSAT's Bulk Capacity reservation or renewal processes to "tie up" INTELSAT capacity or keep it away from other users.

As a matter of policy and practice, COMSAT generally does not reserve (or renew) Bulk Capacity without an underlying firm customer requirement. It is true that COMSAT holds an "automatic FRR" (*i.e.*, a renewal option) on each of its Bulk Capacity leases. But when those leases have been set to expire, COMSAT has always offered its customers an opportunity to renew. *Every time a customer has declined a renewal opportunity, COMSAT has voluntarily relinquished its automatic FRR if it was unsuccessful in obtaining a firm capacity commitment from another customer.* Thus, *in every instance* where COMSAT has renewed an INTELSAT lease, it has done so on behalf of a specific customer.

Moreover, even when COMSAT does not immediately relinquish its automatic FRR, a customer who wishes to obtain that capacity on a direct access basis from INTELSAT may "challenge" COMSAT for the capacity. When "challenged," COMSAT is not told whether the challenger is its existing customer, a new U.S. user, or another entity (*e.g.*, another INTELSAT Signatory seeking capacity on the same satellite). Nonetheless, COMSAT must respond either by relinquishing the "challenged" capacity or by agreeing to pay for it in full. Because COMSAT

does not even know the identity of any challenger, claims that COMSAT can use (or has used) the challenge process or its Signatory role in a targeted way to "thwart" or "block" would-be direct access customers are simply not true.

In sum, the facts demonstrate that COMSAT has not constrained the availability of Bulk Capacity; it gains no competitive advantage from INTELSAT's reservation procedures; and the existence of the "automatic FRR" does not mean that users lack "sufficient opportunity" to obtain leased capacity on a direct access basis.

***The Act's Requirements Must Be Understood in the Context of a "Rule of Reason."*** Statutes requiring private companies to provide others with access to their service or facilities are normally construed using a "rule of reason." Under that "rule of reason," the owner of the facilities is "only required to make services available *to the extent that such services are or can be made available with reasonable effort*"; and, even then, only "*subject to availability.*" Congress was aware of this rule of statutory construction when it enacted ORBIT. Accordingly, it is clear that Congress did not equate ORBIT's phrase "sufficient opportunity" with an "absolute" or "unlimited" right to access on demand.

## Even Assuming That Users Experience Genuine "Problems" In Obtaining Direct Access, ORBIT Imposes Specific Limitations on the Kinds of Regulatory "Solutions" That Would Be Warranted.

***The Commission should foster commercial solutions before resorting to regulatory ones.*** COMSAT is in complete accord with the Commission's statement in the *NPRM* that "the first option" for resolving any hypothetical lack of sufficient direct access opportunities "should be commercial solutions between COMSAT and users and providers seeking to access INTELSAT directly through space segment capacity held or reserved by COMSAT." In fact, subsequent to the FCC's *Direct Access Order*, COMSAT successfully concluded commercial

negotiations with its two largest customers (AT&T and MCI WorldCom) to extend their contracts for new and renewing Circuits. By renewing with COMSAT, these large carriers gained the economic "benefits of direct access" in the form of significant rate reductions and greater flexibility.

COMSAT's post-direct access contracts with AT&T and MCI WorldCom fully demonstrate the viability of such commercial resolution for access to INTELSAT space segment capacity. These mutually beneficial transactions demonstrates the accomplishment of one of the FCC's primary goals for adopting direct access—*i.e.*, to foster competition between COMSAT and INTELSAT. Moreover, smaller customers have also benefited from the availability of direct access even when they have chosen to renew their leases with COMSAT. Since direct access was implemented, virtually every COMSAT customer that has renewed a Bulk Capacity lease has done so at a lower price. Accordingly, ORBIT's ultimate goals of increasing competition and lowering prices for end users are now being realized, even as customers have opted to renew their leases or contracts with COMSAT.

In implementing its direct access policy, the FCC and Congress wanted COMSAT to compete against INTELSAT. The fact that COMSAT has been able to retain customers for INTELSAT capacity in this new environment should not suggest that the capacity retained by COMSAT to serve those customers denies others sufficient opportunities for direct access. To the contrary, COMSAT's commercial undertakings under the direct access regime demonstrate that the market is working as Congress and the FCC hoped it would – and that regulatory intervention would be neither necessary nor appropriate.

***Abrogation of contracts cannot constitute "appropriate action" under ORBIT.*** It would be entirely unprecedented and unwarranted for the Commission to abrogate contractual

rights of a non-dominant carrier that (by definition) does not hold or exercise "market power." In the direct access context, this principle was expressly endorsed in ORBIT Section 641(c), which states that "nothing in the section shall be construed to permit the abrogation or modification of any contract." For the Commission to rely on any pre-existing authority to abrogate or modify COMSAT's contracts would render Section 641(c) a nullity. It would also violate Section 641(b), which requires the Commission to give full effect to the *intent* of Congress in implementing direct access.

***Regulation of Intelsat L.L.C.'s post-privatization distribution arrangements would not constitute "appropriate action" under ORBIT.*** The ORBIT Act expressly provides that its direct access requirement is directed only to INTELSAT – and not to Intelsat L.L.C. (INTELSAT's post-privatization commercial "successor entity"). Indeed, the Act defines "INTELSAT" as an intergovernmental organization created by an international agreement. Intelsat L.L.C., in contrast, is a conventional U.S. business corporation, formed under the Corporate Code of the State of Delaware. Moreover, the concept of "Level 3 direct access" to Intelsat L.L.C. would be illogical. Post-privatization, the very concepts that define "direct access" (*i.e.*, "Signatory" versus "non-Signatory" status, "Level 3," etc.) all will have ceased to exist.

In addition, the Commission lacks any legal basis for imposing "direct access" on Intelsat L.L.C. Immediately upon INTELSAT's privatization, ORBIT will repeal Sections 102 and 201(c) of the Communications Satellite Act, upon which the Commission relied when it initially implemented direct access to INTELSAT (prior to passage of ORBIT). Accordingly, Intelsat L.L.C.'s post-privatization distribution arrangements cannot be singled out for special and unique regulatory burdens.

## CONCLUSION

There is no evidence that users lack "sufficient opportunity" to obtain direct access. The Commission should recognize this fact and promptly conclude the instant proceeding.